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No. 91-10

In the Supreme Court of the United States

OCTOBER TERM, 1991

SPECTRUM SPORTS, INC., ET AL., PETITIONERS

v.

SHIRLEY MCQUILLAN AND LARRY MCQUILLAN
DBA SORBOTURF ENTERPRISES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

KENNETH W. STARR
Solicitor General

CHARLES A. JAMES
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES W. LOWE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether liability for attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, may be based solely on the defendant's conduct, without proof of a relevant market or the defendant's market power.

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INTEREST OF THE UNITED STATES

The United States is principally responsible for enforcing the Sherman Act, 15 U.S.C. 1 and 2. The United States has a strong interest in this Court's resolution of the question presented in this case, which will affect public and private enforcement of the federal antitrust laws. At the Court's invitation, the United States filed a brief in this case at the certiorari stage.

STATEMENT

1. Sorbothane is a patented elastic polymer with shock-absorbing characteristics. It is used in a variety of medical, athletic, and equestrian products.

Respondents Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of sorbothane products from 1981 to mid-1983. Shirley McQuillan was also active in efforts to develop equestrian products made from sorbothane. Petitioner Spectrum Sports, Inc. (Spectrum), was at all relevant times a distributor of sorbothane products. Petitioner Kenneth B. Leighton, Jr., is a co-owner of Spectrum. Pet. App. A3-A7.

In 1980, respondents contacted the British manufacturers of sorbothane to discuss the possibility of using sorbothane in horseshoe pads. Pet. App. A4. Respondents were referred to Hamilton-Kent Manufacturing Company, which controlled the rights to manufacture and distribute sorbothane in the United States. Petitioner Leighton was then Hamilton-Kent's vice president of marketing. Respondents and Hamilton-Kent signed a letter of intent that granted respondents the exclusive right to purchase sorbothane for use in equestrian products. *Ibid.*

While respondents were developing a sorbothane horseshoe pad, Hamilton-Kent was exploring other potential markets for sorbothane in the United States, including athletic shoe inserts and medical products. In mid-1981, Hamilton-Kent decided to establish a network of five regional distributors of sorbothane products. Hamilton-Kent selected respondents to distribute all sorbothane products, including shoe inserts and medical products, in the southwestern United States. Spectrum was chosen as one of the other regional distributors. The distributors began selling sorbothane products in September 1981. Pet. App. A5.

In January 1982, Hamilton-Kent shifted responsibility for selling medical products from the five regional distributors to a single national distributor. In

April 1982, and again in May 1982, Hamilton-Kent told respondents that it wanted them to relinquish their athletic shoe distributorship as a condition for retaining the right to develop and distribute equestrian products. Respondents refused, and continued to place and receive orders for athletic shoe inserts. Pet. App. A5-A6.

By the fall of 1982, Sorbothane, Inc., had assumed Hamilton-Kent's manufacturing rights to sorbothane. (Both Hamilton-Kent and Sorbothane, Inc., are wholly owned subsidiaries of BTR, Inc., which controls the patent rights to sorbothane. Pet. App. A3.) Sorbothane, Inc., selected a national equestrian distributor and prohibited respondents from distributing equestrian products. In January 1983, Sorbothane, Inc., began marketing through its national distributor a horseshoe pad based on respondents' design. *Id.* at A7. On August 1, 1983, Sorbothane, Inc., informed respondents that it would no longer accept their orders for any sorbothane products. Spectrum was named the exclusive national distributor of athletic shoe inserts. *Ibid.*; Pet. 6.

Respondents then sought to purchase sorbothane from the British manufacturer, Leyland and Birmingham. (Leyland and Birmingham, like Sorbothane, Inc., is a wholly owned subsidiary of BTR, Inc.) Leyland and Birmingham refused to sell sorbothane in the United States. Lacking a source of sorbothane, respondents' distributorship failed. Pet. App. A8.

2. Respondents sued petitioners seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, Section 3 of the Clayton Act, 15 U.S.C. 14, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962,

California's unfair competition law, Cal. Bus. & Prof. Code § 17200 (West 1987), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750 (West 1987 & Supp. 1992). Respondents also alleged that petitioners were liable for fraud, breach of contract, interference with prospective business advantage, bad faith denial of the existence of an oral contract, and conversion. See R.E. 1-47 (Second Amended Complaint).[1]

At the conclusion of the trial, the jury found that petitioners had violated Section 2—but not Section 1—of the Sherman Act. The jury also found that petitioners were liable for interference with prospective business advantage and for violations of RICO and California's unfair competition law. The jury awarded respondents $1,743,000 in compensatory damages on all claims and awarded an additional $500,000 in punitive damages, which respondents waived. The district court trebled the compensatory damages pursuant to Section 4 of the Clayton Act, 15 U.S.C. 15, RICO, 18 U.S.C. 1964(c), and the California Cartwright Act, Cal. Bus. & Prof. Code § 16750(a) (West 1987 & Supp. 1992), and awarded an additional $912,032.50 in attorneys' fees pursuant to Section 4 of the Clayton Act. Petitioners moved for judgment notwithstanding the verdict and for a new trial; the district court denied the motions. Pet. App. A2, A30-A31; Special Verdict Form I-XIX.

3. The Ninth Circuit affirmed in an unpublished memorandum decision. Pet. App. A1-A28. Because the jury awarded the same damages on all claims

[1] Respondents sued, in addition to petitioners, Sorbothane, Inc., Hamilton-Kent, BTR, Inc., and Kenneth M. Leighton, Sr. Those additional defendants have filed a separate petition for a writ of certiorari, No. 91-32.

against petitioners, the court observed that affirming a single trebled claim against each petitioner was sufficient to affirm the judgment. *Id.* at A27-A28.

The court of appeals noted that the district court had not required the jury to specify whether its finding that petitioners were liable under Section 2 of the Sherman Act was based on monopolization, attempted monopolization, or conspiracy to monopolize. Pet. App. A15. The court of appeals concluded that the jury's verdict could stand if the evidence supported any of the three possible bases for Section 2 liability. *Ibid.* The court proceeded to consider only the attempted monopolization claim.

The court rejected petitioners' argument that the evidence was not sufficient to support a verdict for respondents on the attempted monopolization claim because respondents had failed to present evidence of petitioners' specific intent to monopolize a relevant market, or evidence that Spectrum's attempt to monopolize was likely to succeed because it possessed substantial market power in a relevant market. Relying on its decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964), the court concluded (Pet. App. A19) that no such evidentiary showing is required, because "dangerous probability of success * * * may be inferred from proof of specific intent, which in turn may be inferred from conduct." *Id.* at A17. The court of appeals therefore upheld the district court's instruction to the jury that "evidence of unfair or predatory conduct * * * may satisfy both the specific intent and dangerous probability elements of the offense [of attempted monopolization], without any

proof of relevant market or the defendant's market-power." *Id.* at A19.[2]

The court of appeals concluded that the evidence was sufficient to establish that petitioners engaged in unfair or predatory conduct, despite the jury's determination that petitioners—unlike the other defendants—had not engaged in conduct that violated Section 1 of the Sherman Act. Pet. App. A21. Accordingly, the court held that respondents were not required to establish a relevant market or prove that petitioners had market power. *Ibid.*

On petition for rehearing, the court of appeals amended its opinion to delete a statement that petitioners had failed to object to the jury instruction incorporating the *Lessig* holding. Pet. App. A32-A33.

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[2] The district court instructed the jury as follows:

> In order to win on the claim of attempted monopoly, the plaintiff must prove each of the following elements by a preponderance of the evidence: First, that the defendants had a specific intent to achieve monopoly power in the relevant market; second, that the defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that defendants could sooner or later achieve its [*sic*] goal of monopoly power in the relevant market; fourth, that the defendants' conduct occurred in or affected interstate commerce; and, fifth, that the plaintiff was injured in the [*sic*] business or property by the defendants' exclusionary or restrictive conduct. * * * If the plaintiff has shown that the defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element [*sic*] of the offense without any proof of relevant market or the defendants' marketing [*sic*] power.

Tr. 4349-4350.

SUMMARY OF ARGUMENT

The court of appeals affirmed the judgment against petitioners solely on the basis of its *Lessig* rule, which allows a trier of fact to infer both specific intent to monopolize and dangerous probability of success from "unfair" or "predatory" conduct alone. That rule is unsound. It allows the trier of fact to impose liability for attempted monopolization without considering the actual probability of monopolization. Section 2 of the Sherman Act, unlike Section 1, applies to the conduct of a single firm. Efficient and beneficial competition is often difficult to distinguish from predatory conduct; successful competitors inevitably disadvantage their rivals, who may well view the tactics of their marketplace opponents as unfair. Consequently, unilateral conduct is unlawful under Section 2 only when that conduct threatens actual monopolization. Proof of a claim of attempted monopolization must, accordingly, include a threshold showing that the defendant's alleged conduct posed a realistic threat of actual monopolization.

Probability of actual monopolization can be appropriately assessed only by defining a relevant market and evaluating the challenged conduct in the context of that market. No matter how improper the defendant's conduct, a defendant cannot exercise monopoly power over a group of products or a geographic area that does not constitute a relevant market. Such market characteristics as market share and potential for entry must be considered in evaluating the probability of actual monopolization.

Moreover, in considering the intent element of attempted monopolization, it is essential that the trier of fact be required to determine whether the defendant specifically intended to monopolize, as opposed to

intending to disadvantage rivals. That determination requires consideration of procompetitive justifications for the challenged conduct.

This carefully established framework of Section 2 analysis is jettisoned under the Ninth Circuit's much-criticized *Lessig* decision. The *Lessig* rule allows the trier of fact to impose liability for attempted monopolization solely on the basis of the defendant's conduct, viewed in isolation from the realities of the marketplace. That is not only counterintuitive, it is contrary to the basic purpose of the antitrust laws. As a substantive principle of antitrust law, the *Lessig* rule is more likely to chill legitimate competition than to further the procompetitive goals underlying the Sherman Act. Yet, the court of appeals affirmed the district court's judgment solely on *Lessig* grounds. That resolution was wrong, and the Ninth Circuit's judgment should be reversed.

ARGUMENT

LIABILITY FOR ATTEMPTED MONOPOLIZATION IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT MAY NOT BE BASED ON CONDUCT ALONE, WITHOUT REGARD TO THE STRUCTURE OF THE RELEVANT MARKET

A. Proving Attempted Monopolization Requires Proof of a Dangerous Probability of Monopolization

1. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine * * *, or by imprisonment * * *, or by both said punishments.

15 U.S.C. 2. Section 2 creates three offenses—monopolization, attempted monopolization, and conspiracy to monopolize—but does not define any of them. Nor does the sparse legislative history of Section 2 shed light on the nature of the offense of attempted monopolization. With little discussion, Section 2 was added to the Sherman bill late in the legislative process. See 1 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes* 23-25 (1978); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 617, at 39 (1978). It is nevertheless well established that the offense of attempted monopolization requires both intent to monopolize and a dangerous probability of success.

This Court first addressed the meaning of the attempt provision of Section 2 in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905). Drawing on the criminal law of attempts, Justice Holmes's opinion for the Court concluded:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. * * * But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.

196 U.S. at 396 (citing *Commonwealth* v. *Peaslee*, 59 N.E. 55 (Mass. 1901)). Although the Court's refer-

ence in *Swift* to "intent and the *consequent* dangerous probability" of monopolization might be read to suggest that intent to monopolize alone is sufficient to prove a dangerous probability of success, the Court made clear elsewhere in its opinion that specific intent and dangerous probability are distinct elements of the offense of attempted monopolization. The Court specifically explained that "[n]ot every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree." 196 U.S. at 402. *Swift* therefore establishes that a dangerous probability of achieving monopoly, as well as intent to achieve that end, are essential elements of the offense of attempted monopolization.[3]

The Court's more recent discussions of attempted monopolization reaffirm the importance of proving a dangerous probability of actual monopolization. In *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965), the Court held that enforcing a fraudulently obtained patent may violate the Sherman Act in certain circumstances. In discussing the application of Section 2 on remand, the Court stated that a claim of monopolization or attempted monopolization would require a court to "appraise the exclusionary power of the

[3] Justice Holmes restated the *Swift* test in a way that reinforces that point in a subsequent opinion in which he dissented on other grounds:

> [C]ombination, intention and overt act may all be present without amounting to a criminal attempt—as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success.

Hyde v. *United States*, 225 U.S. 347, 387-388 (1912) (Holmes, J., dissenting).

illegal patent claim in terms of the relevant market for the product involved." 382 U.S. at 177. The Court explained that "[w]ithout a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition." *Ibid.* The Court has also emphasized the fundamental distinction between Section 2 of the Sherman Act, which is directed primarily to unilateral conduct, and Section 1 of that Act, which is directed to concerted activity. *Copperweld Corp* v. *Independence Tube Corp.*, 467 U.S. 752 (1984). Because unilateral conduct is less likely than concerted activity to threaten competition, the Court concluded that "[t]he conduct of a single firm * * * is unlawful only when it threatens actual monopolization." 467 U.S. at 767.[4] See also *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 154 (1951) (firm that "already enjoy[s] a substantial monopoly * * * violates the 'attempt to monopolize' clause of § 2 when it uses its monopoly to destroy threatened competition"); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946) (quoting jury instruction that attempt to monopolize means "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it").[5]

[4] In contrast, a horizontal conspiracy to fix prices—*i.e.*, collaborative activity—does not require proof that the conspirators were capable of achieving their objective. See *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 243 (1980); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59 (1940).

[5] Although statements in some of the Court's prior opinions have been cited as authority for the proposition that proof of attempted monopolization does not require a showing of a

2. The court of appeals based its Section 2 ruling on its earlier decision in *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), cert. denied, 377 U.S. 993 (1964). The facts in *Lessig* were these: The plaintiff leased a service station from Tidewater Oil Company. Lessig alleged that Tidewater had violated the antitrust laws by (1) fixing the prices at which its dealers resold gasoline, and (2) requiring its dealers to purchase petroleum products, tires, batteries, and accessories exclusively from Tidewater. The jury returned a verdict for Tidewater, and *Lessig* appealed. On appeal, Tidewater argued that it was not liable for attempted monopolization unless Lessig proved a "dangerous probability of success," and that such proof "requires an evaluation of Tidewater's power in the relevant market." 327 F.2d at 474.

The court of appeals in *Lessig* "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." 327 F.2d at 474. Although the court acknowledged that the probability of actual monopolization may be relevant to prove the defendant's intent, it concluded that "specific intent itself is the only evidence of dangerous probability the statute requires—

dangerous probability of success, the Court has never accepted that proposition. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 532 (1948), and *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226 (1947), the Court neither expressly considered that question nor imposed liability for attempted monopolization. In *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the Court stated in a footnote (*id.* at 395 n.23) that "the scope of the market was not in issue" in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). In *Story Parchment*, however, the market was not "in issue" in this Court because the parties did not challenge the market definition adopted by the lower courts. See 282 U.S. at 559.

perhaps on the not unreasonable assumption that the actor is better able than others to judge the practical possibility of achieving his illegal objective." *Ibid.*

In subsequent cases, the Ninth Circuit has held that a specific intent to monopolize may be inferred from the defendant's conduct. See, *e.g.*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029 n.11 (1981), cert. denied, 459 U.S. 825 (1982); *Janich Bros.* v. *American Distilling Co.*, 570 F.2d 848 (1977), cert. denied, 439 U.S. 829 (1978). The *Lessig* doctrine thus allows the finder of fact to draw a "double inference"—inferring specific intent from conduct, and then inferring dangerous probability of success from specific intent. The result is that, under *Lessig*, proof of "unfair" or "predatory" conduct alone is sufficient to prove attempted monopolization. Pet. App. A19.[6]

The court of appeals' reasoning in support of the *Lessig* rule is unpersuasive. The *Lessig* court quoted (327 F.2d at 474 n.46) this Court's reference in

[6] The Ninth Circuit has not been entirely consistent in applying the *Lessig* rule. In *Oahu Gas Serv., Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, cert. denied, 488 U.S. 870 (1988), the Ninth Circuit held that potentially anticompetitive conduct will not necessarily lead to antitrust liability under Section 2 if there are legitimate business justifications for the conduct. Under *Oahu Gas*, the *Lessig* rule should not be used to impose Section 2 liability for unilateral conduct that may be procompetitive. Moreover, at least one recent Ninth Circuit decision recognizes the importance of market analysis in determining Section 2 liability. *Thurman Indus., Inc.* v. *Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1378 (1989). But the Ninth Circuit has never repudiated the *Lessig* doctrine. And as this case illustrates, some Ninth Circuit decisions continue to impose liability for attempted monopolization without any market analysis or consideration of the procompetitive justifications for the defendant's conduct.

Swift to "intent and the *consequent* dangerous probability" of success, and cited (327 F.2d at 474) footnote 23 of this Court's opinion in *United States* v. *du Pont & Co.* for the proposition that the relevant market is "not in issue" in an attempted monopolization case. Neither *Swift* nor *du Pont* supports *Lessig*'s odd analysis. As we have explained, *Swift* established that specific intent and dangerous probability of success are separate elements of the attempted monopolization offense. The *du Pont* decision did not overrule *Swift*; and the Court subsequently reaffirmed the rule of *Swift* in *Walker Process* and again in *Copperweld*.

The *Lessig* court also relied on the language of Section 2, which prohibits monopolizing, attempting to monopolize, or conspiring to monopolize "any part of the trade or commerce among the several States." The court interpreted this language to mean that Section 2 reaches any attempt to monopolize "an appreciable segment of interstate sales." 327 F.2d at 475. But the "any part of trade or commerce" language applies to monopolization as well as to attempts to monopolize, and it is well established that proving monopolization requires proof of substantial market power in a relevant market. See *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); *United States* v. *du Pont & Co.*, 351 U.S. at 404. By expanding the offense of attempted monopolization to include conduct that does not create a realistic probability of actual monopolization, the *Lessig* rule converts many garden-variety business torts into federal antitrust violations. Moreover, *Lessig*'s expansive reading of the statutory language would imply that any arrangement that affects an appreciable segment of sales—including vertical integration, vertical mergers, and requirements contracts—would violate Section 2.

See 3 P. Areeda & D. Turner, *supra*, ¶ 811, at 298. This Court's antitrust jurisprudence precludes interpreting Section 2 to wreak such extreme results.

The *Lessig* rule thus rests on unsound legal foundations. In addition, *Lessig* is at odds with the procompetitive purposes of the Sherman Act. As a substantive principle of antitrust law, the *Lessig* rule is more likely to chill legitimate competition than to invigorate it. Consequently, it is not surprising that *Lessig* has been rejected by every other court of appeals,[7] and roundly criticized by commentators.[8]

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[7] See *CVD, Inc.* v. *Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985), cert. denied, 475 U.S. 1016 (1986); *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1079 (3d Cir. 1978); *Abcor Corp.* v. *AM Int'l, Inc.*, 916 F.2d 924, 926, 931 (4th Cir. 1990); *C.A.T. Indus. Disposal, Inc.* v. *Browning-Ferris Indus., Inc.*, 884 F.2d 209, 210 (5th Cir. 1989); *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 917 F.2d 1413, 1431 (6th Cir. 1990), cert. denied, 112 S. Ct. 274 (1991); *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1413-1416 (7th Cir. 1989); *General Indus. Corp.* v. *Hartz Mountain Corp.*, 810 F.2d 795, 804 (8th Cir. 1987); *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 (10th Cir. 1989), cert. denied, 111 S. Ct. 441 (1990); *Key Enter. of Delaware, Inc.* v. *Venice Hosp.*, 919 F.2d 1550, 1565 (11th Cir. 1990); *Neumann* v. *Reinforced Earth Co.*, 786 F.2d 424, 428-429 (D.C. Cir.), cert. denied, 479 U.S. 851 (1986); *Abbott Laboratories* v. *Brennan*, 952 F.2d 1346, 1354 (Fed. Cir. 1991), petition for cert. pending, No. 91-1690 (filed Apr. 23, 1992).

[8] See, *e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 832.1 (Supp. 1991); 2 E. Kintner, *Federal Antitrust Law* § 13.4 (1980 & Supp. 1992); Areeda, *Monopolization, Mergers and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959, 970-975 (1987); Gifford, *The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize*, 61 Notre Dame L. Rev. 1021 (1986); Handler, *Reforming the Antitrust Laws*, 82 Colum. L. Rev. 1287, 1352-1357

3. The fundamental defect of the *Lessig* rule is that it undermines the procompetitive purposes of the Sherman Act. As the Court explained in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. at 767-768, an allegation that unilateral conduct violates the Sherman Act must be evaluated with caution because "it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." See also *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984); *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986). An efficient, vigorous competitor may "capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result." *Copperweld*, 467 U.S. at 767. From the perspective of the firm that cannot keep pace, the efficient competitor's tactics may appear to be "unfair" or "predatory." Yet, "[t]his is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims

(1982); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974); Hibner, *Attempts to Monopolize: A Concept in Search of Analysis*, 34 A.B.A. Antitrust L.J. 165, 171 (1967). It has been suggested that a law review article by Professor Turner "is very much responsible" for *Lessig*. See Cooper, 72 Mich. L. Rev. at 409 (quoting Turner, *Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281, 305-307 (1956)). But Professor Turner has disavowed support for *Lessig*. See Turner, *The Scope of "Attempt to Monopolize"*, 30 Record of the Bar Ass'n of the City of N.Y. 487, 488 (1975) ("traditional formulation of the attempt offense, closely tying it to monopolization, is basically correct"), 506 n.21 (expressing regret that "imprecise statements in an earlier article * * * have apparently contributed to * * * an undue broadening of the 'attempt' offense").

to foster." *Ibid.* For these reasons, unilateral conduct subject to Section 2—in contrast to concerted action subject to Section 1, which "inherently is fraught with anticompetitive risk" (467 U.S. at 768) and therefore is condemned in certain circumstances as per se illegal—"is unlawful only when it threatens actual monopolization." 467 U.S. at 767. As the Seventh Circuit observed in *Ball Memorial Hosp. Inc.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (1986):

> Competition is a ruthless process. * * * The deeper the injury to rivals, the greater the potential benefit [to consumers]. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. * * * [Accordingly, Section 2] must be used with the greatest caution. Action that injures rivals *may* ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition.

Because it is often difficult to characterize a firm's conduct for antitrust purposes, and because it is relatively easy for plaintiffs to bring a lawsuit under Section 2, eliminating the requirement that plaintiffs show a dangerous probability of success "might discourage the healthy competition that section 2 is intended to nurture * * * and deter businesses from aggressively expanding into new markets." *International Distrib. Centers* v. *Walsh Trucking Co.*, 812 F.2d 786, 791 (2d Cir.), cert. denied, 482 U.S. 915 (1987). Accordingly, only if the trier of fact is required to determine whether the challenged conduct threatens actual monopolization can there be reasonable assurance that the verdict will promote, rather

than inhibit, competition. See 3 P. Areeda & D. Turner, *supra*, ¶ 833, at 342 (describing "potentially devastating effect" on competition of applying Section 2 to defendants without substantial market power).[9]

Outside the Ninth Circuit, the courts of appeals are in agreement that a plaintiff cannot establish a dangerous probability of monopolization simply by proving conduct. Instead, the plaintiff must show that (1) the defendant intended to monopolize a relevant market, (2) the defendant engaged in anticompetitive or exclusionary conduct in furtherance of that intent, and (3) there was a dangerous probability that the defendant would achieve monopoly power in the relevant market. See note 7, *supra*; 3 P. Areeda & D. Turner, *supra*, ¶ 820, at 312. Because proof of a dangerous probability of monopolization is necessary to further the procompetitive purposes of the Sherman Act, we believe that the courts of appeals other than the Ninth Circuit have correctly formulated the elements of the attempted monopolization offense.[10]

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[9] As this case illustrates, the boundaries of "predatory" conduct can be elusive. Although the jury rejected respondents' claim under Section 1 of the Sherman Act that petitioners participated in a conspiracy in unreasonable restraint of trade, the court of appeals nevertheless concluded that the evidence offered in support of the Section 1 claim was sufficient to establish "predatory" conduct for purposes of the attempted monopolization claim. See Pet. App. A21.

[10] The Model Penal Code bases criminal liability for attempt on "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime." Model Penal Code § 5.01(1)(c) and (2) at 81 (Proposed Official Draft 1962). In many criminal contexts, the Model Penal Code states the appropriate standard of liability for attempt. But the "proximity approach" adopted by

B. Establishing a Dangerous Probability of Monopolization Requires Proof of a Relevant Market and a Showing That the Defendant Has Sufficient Market Power

1. In order to assess the probability that a defendant's activities will have anticompetitive effects, the finder of fact must place them in the context of a relevant market. Even conduct that is unambiguously tortious or otherwise clearly improper may not threaten the vitality of competition in the market. For example, the firm engaging in improper conduct may be a very small player whose actions have little effect on the market. Or it may be clear that any attempt to exercise market power would promptly attract substantial new entry that would force prices back down. Consequently, evidence of conduct alone, in the absence of evidence about the market, cannot reliably predict the probability of actual monopolization. Of course, we do not suggest that tortious or otherwise improper conduct must go unpunished merely because it does not threaten harm to competition. Much of state tort law is designed to remedy just such conduct. In this case, for example, respondents challenged petitioners' conduct under a variety of California laws in addition to the federal antitrust laws.[11]

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this Court in *Swift & Co.* v. *United States* remains in use. See 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.2(d), at 31-34 (1986). At all events, abandoning the dangerous probability requirement in the context of Section 2 of the Sherman Act would be inappropriate because of the risk that a relaxed standard would deter legitimate procompetitive conduct.

[11] Professors Areeda and Turner have suggested that a very narrow category of unilateral activity might be held to violate Section 2 without requiring any market analysis. Such activity would (1) be "totally unrelated to competition on the

2. The definition of a relevant market is central to the proper analysis of attempted monopolization claims. Market definition in Section 2 cases is the process of identifying a product or group of products and a geographical area in which a hypothetical monopolist could exercise market power—*i.e.*, charge a price above the competitive level for a significant period of time.[12] If a seller attempts to charge a monopoly price for a product or in a geographic area that is too narrowly drawn to constitute a market, the seller's attempt will prove unprofitable because too many consumers will shift to other products or sellers. A seller who attempts to monopolize something narrower than a relevant market cannot cause significant economic harm. See 2 P. Areeda & D. Turner, *supra*, ¶ 517, at 346-347 (1978). Thus, the definition of a

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merits," (2) "clearly impl[y] the presence or prospect of some durable degree of market power" and (3) have "potentially significant exclusionary effects." See 3 P. Areeda & D. Turner, *supra*, ¶ 836, at 352. Areeda and Turner suggest that examples of such activity might include predatory pricing and fraudulent procurement of an invalid patent. *Id.* at 353. Because the court of appeals did not suggest that this case involves any such activity, there is no need for the Court to consider whether there may be a narrow exception to the general requirement of market analysis in attempted monopolization cases. It is our view that the anticompetitive effects of such an exception would probably outweigh its benefits. In many cases, it would be difficult to determine whether particular conduct satisfied the Areeda and Turner (or similar) criteria. Consequently, an exception to the market analysis requirement, like the *Lessig* rule itself, might deter vigorous competition by individual firms.

[12] "[M]onopoly power" is simply a high degree of market power. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981).

relevant market is an essential first step in analyzing a claim of attempted monopolization.

Once the relevant market has been defined, it is possible to consider whether the defendant has sufficient power in that market to create a dangerous probability that it will succeed in monopolizing. One significant indicator of such power is the defendant's market share. See *Twin Laboratories, Inc.* v. *Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990); *Shoppin' Bag of Pueblo, Inc.* v. *Dillon Cos., Inc.*, 783 F.2d 159, 161 (10th Cir. 1986). In general, "[t]he higher the firm's initial market share, the greater the likelihood that it will eventually gain monopolistic control over the market." *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 694 (10th Cir. 1989), cert. denied, 111 S. Ct. 441 (1990) (citing *Shoppin' Bag*, 783 F.2d at 162).

Market share, however, must be placed in context; the structure of the market can also affect significantly a firm's ability to monopolize. *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989). For example, there may be a dangerous probability that a firm will monopolize a market with high barriers to entry or with little excess capacity, even though a firm with the same market share might have no realistic possibility of monopolizing a market with greater excess capacity or substantially lower entry barriers. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. at 944-951; *William Inglis & Sons Baking Co.* v. *Continental Baking Co.*, 942 F.2d 1332, 1347-1348 (9th Cir. 1991) (Noonan, J. concurring in part, dissenting in part).[13]

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[13] Most courts of appeals that have considered the issue have required substantial market share on the part of the

The probability of actual monopolization ordinarily should be considered as a threshold matter in an attempted monopolization case. If it is clear that the defendant firm's position in the relevant market does not afford it a significant possibility of monopolizing, there is no violation of Section 2 regardless of the nature of the conduct. At that point, there is no reason for the inquiry to proceed further, and judgment for the defendant is appropriate. See *National Reporting Co.* v. *Alderson Reporting Co.*, 763 F.2d 1020, 1025 (8th Cir. 1985). By treating the probability of actual monopolization as a threshold matter, the courts will eliminate the need for time-consuming and expensive inquiries into the defendant's conduct and intent in some cases.

3. As the Court explained in *Swift*, specific intent is also an essential element of attempted monopolization. Section 2 of the Sherman Act is not a no-fault statute; it reaches only conduct that causes monopolization through improper means. See *United States* v.

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defendant in order to prove a dangerous probability of success. See, *e.g.*, *Colorado Interstate Gas*, 885 F.2d at 694-695 (41% share not enough in face of evidence that defendant could never actually succeed); *Indiana Grocery*, 864 F.2d at 1414 (nearly 50% share not enough); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (33% share not enough); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976) (50% share not enough), cert. denied, 429 U.S. 1122 (1977). Cf. *American Academic Suppliers, Inc.* v. *Beckley-Cardy, Inc.*, 922 F.2d 1317, 1319-1320 (7th Cir. 1991) ("[T]o be guilty of attempted monopolization a defendant must have monopoly power (because otherwise his attempt does not have a dangerous probability of succeeding)"). But see *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 490-491 (5th Cir. 1984) (less than 10% share may be enough where "special market conditions" exist).

Aluminum Co. of America, 148 F.2d 416, 429-430 (2d Cir. 1945). Intent for purposes of Section 2 should not be confused with mere intent to cause harm to a competitor; any firm embarked on a course of vigorous competition hopes to take customers away from its rivals. *Ball Memorial*, 784 F.2d at 1335-1336. Yet the *Lessig* standard, which makes no provision for consideration of procompetitive justifications for the defendant's conduct, lends itself to such confusion. Because direct evidence of intent to monopolize will seldom be available, it will often be necessary to make inferences about a defendant's intent from the nature of its conduct. But the trier of fact should be required to consider procompetitive justifications for the conduct at issue and to determine whether the defendant specifically intended not just to disadvantage a rival, but to monopolize the relevant market.[14]

C. The Instructions Improperly Allowed the Jury to Find Petitioners Liable for Attempted Monopolization Without Regard to the Probability of Actual Monopolization

The court of appeals affirmed the judgment against petitioners on the Section 2 claim solely on the basis of the *Lessig* doctrine. Because the jury instructions on attempted monopolization and the court of appeals' affirmance of the Section 2 verdict were based on *Lessig*, there are no findings concerning the relevant

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[14] Some commentators have suggested that proof of intent to monopolize is unimportant or unnecessary as a matter of antitrust policy. See 3 P. Areeda & D. Turner, *supra*, ¶¶ 821-822 at 313-316; Cooper, 72 Mich. L. Rev. at 398-400. But it has been settled since this Court's decision in *Swift & Co.* v. *United States*, *supra*, that intent to monopolize is an element of the offense of attempted monopolization. Moreover, criminal liability for attempt generally requires an intent to commit the substantive offense. See 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 6.2(c), at 24-26 (1986).

market, the extent of Spectrum's market power, or any procompetitive justifications for petitioners' conduct.

It is possible that the jury's verdict was not based on an attempt to monopolize theory, but rather on a finding that petitioners monopolized or conspired to monopolize. But the jury was not asked to specify the basis for its Section 2 verdict, and therefore it is also possible that its verdict was based solely on the attempt claim. Accordingly, the Section 2 judgment should be reversed. See *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962). Cf. *Griffin* v. *United States*, 112 S. Ct. 466, 472-474 (1991) (distinguishing, in criminal context, factual insufficiency from legal inadequacy).

CONCLUSION

The judgment of the court of appeals on the Section 2 claim should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

CHARLES A. JAMES
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
JAMES W. LOWE
Attorneys

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